CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF LOUISIANA.

WESTERN DISTRICT, SEPTEMBER TERM, 1816.

BROUSSARD vs. TRAHAN'S HEIRS. *Vol. 3, 725.*

If a district court improperly deny a continuance, relief may be had in the supreme court.

Eyrat, for the defendants. The affidavit on which a continuance was prayed by the defendants shews that they could not safely come to trial, on account of the absence of a record, which was material to their defence, and which notwithstanding every effort in their power, had been used, they had not been able to procure. Injustice was therefore done them, and the only remedy, which the law has provided for them, is the interposition of this court, in ordering a new trial. The power of awarding it is expressly given by the 18th section of the act of 1813, ch. 47: which authorises the supreme court, or any

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court to which an appeal is allowed to remand the cause to the inferior court, from which the appeal is made, for a new trial, *whenever it shall appear that justice requires it.*

The court is not fettered by any positive rule, but is left to the sound exercise of its discretion; if there be any rule of common law, any maxim of the civil law, any precedent in the practice of the former courts of this state, which militates against the exercise of the discretion of this court, the legislator has abrogated it.

Indeed as great an injury may be done to a suitor, by denying him a continuance and compelling him to go to trial, when, notwithstanding his utmost deligence, he has not been able to procure the testimony, by which he is to support his defence, as by giving a wrong judgment against him.

Whenever this court sees that the inferior one has, in any part of its proceedings, done an irreparable injury, *gravamen irreparabile*, to a suitor they will relieve him, whether this be in giving final judgment or an interlocutory one. It is true the party cannot appeal *de plano* from an interlocutory judgment; because by adventure, the final one may be in his favor, but it does not follow, from the circumstance, that he is to wait the final decision of his case in the inferior court,

that this court will shut their eyes, when he is able to point out a material error in any part of the proceedings.

It is true the English books of practice lay it down as an undoubted principle, that the denial of a continuance cannot be remedied by a writ of error: but this is a court of appeals not a court of error.

In the United States even this maxim of British jurisprudence is exploded, and the denial of a continuance may be assigned as an error on which the judgment will be reversed. 4 *Henning and Munford*, 156. 1 *Washington*.

Baldwin and *Porter*, for the plaintiff. The motion made by the appellants ought not to prevail; 1. Because, the granting, or refusing a continuance, depends on the discretion of the court below, and cannot be assigned as error here. 2. Because, if subject to re-examination in this court, no error was committed by the inferior tribunal.

This court which is appellate, and has by law powers vested in it to re-examine, and reverse or affirm, the decisions of the inferior courts of this state, must in the exercise of those powers, be guided by the statute, which regulates its practice.

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By the act passed the 10th of February 1813, regulating the practice of the supreme court, and establishing courts of inferior jurisdiction, sect. 11—this tribunal is authorised to re-examine, reverse, or affirm, *the final judgments* of any of the district courts, where there is a special verdict; or on a statement of facts made out by counsel, or the judge, who tried the cause.

By the act, supplementary to the act just mentioned, passed the 26th of March 1813, sect, 17; it is provided, that during the trial of a cause, the opinion of the court may be asked for, on *any matter of law*—that the party dissatisfied therewith, may except thereto; that the exception &c. shall be entered on the record, and sent up with the other proceedings in the cause.

From this statute, errors in fact are only examinable, after final judgment; and the erroneous opinion of the court, on *matters of law*, during the progress of the trial, can alone be the ground of a bill of exceptions.

This court then, must be satisfied that it was *on a matter of law*, the opinion of the court below was asked; and that there was error in that opinion, before they can remand the cause.

We contend it was not on a *matter of law*, the opinion of the court was demanded here; it was an indulgence that was prayed for, which

the tribunal, before whom the cause was pending, in its discretion, could accord or refuse, and in the granting or denying of which, no legal error could be consequently committed.

This will be made clear, from an examination of the law, on the subject.

Continuances, are *not a matter of right*, either in the crown, or the prisoner; *M'Nally (Byrn's edition,)* 454, *Foster's Crown Law*, 2. Civil and criminal cases, stand in this respect on the same footing, 3 *Burrows* 1513.

Continuances are usually granted on a general affidavit. But the courts of common pleas and king's bench, have different rules on the subject, 2 *Tidd* 708; and in a penal action, it will be refused altogether, *ibid, same page.*

Nor will it be granted, where the defence to be established is slavery. 1 *Bosanquet & Puller*, 454.

Nothing can be conceived more positive, than these authorities. If *it was a legal right*, the courts then could not grant it in one kind of action, and refuse it in another. They dare not make such a distinction, even in that country: nor would two such writers as M'Nally and Foster, be found to state expressly, that no such right existed.

The decisions in our own country, are equally

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as certain and imperative on this head, as those in England.

In 1 *Binney's Reports, 226 and 2 ibid.* 80-[illegible], the supreme court of Pensylvania declares, that many things must be left to the discretion of inferior courts, among others, new trials, and the granting or refusing continuances;—and that the exercise of that discretion could not be reviewed there.

In 5 *Cranch, pages* 11 - 16 - 187 - 280, the same doctrine is laid down in strong terms. And in the same work, *vol.* 4 237. *and vol.* 217, the supreme court of the union, expressly decides, that the refusing to grant a continuance cannot be alledged, as matter of error there, that it is a power, resting entirely in the discretion of the court, who tries the cause.

By the laws of Spain, the giving time to the testimony, depends on the will of the judge. *Curia Phillipica, p.* 1, *title Dilaciones*, and it is where appears, that an appeal lies from his refusal to accord it. *ibid.*

In our late superior court, a continuance was refused, though founded on a strong affidavit, because accompanied by suspicious circumstances, in the party who made it—1 *Martin*, 3.

In opposition to this strong current of authority, gathered from writers of the first eminence,

or collected from the decisions of courts of the highest grade, and most exalted wisdom; this tribunal is required on the authority of one solitary decision in Virginia, 4 *Henning and Munford*, 137, and on a fanciful distinction, between the powers of this, and other appellate courts, to establish *that* to be a legal right here, which appears with the above solitary exception, not to be such any where else.

It is said, this court is different from the courts from whence these decisions are drawn—that here, our appellate tribunal can reverse for errors in fact, and there they cannot take notice of any thing, which does not appear on the record. But a reference to our statute, already cited, answers this—and shews that on bills of exceptions, this court can examine only *errors in law*. Every book we open on the subject tells us a continuance is not a legal right; how then could the court below commit *an error in law* in refusing it?

Again, the court is told that by statute, this court has the power to remand a cause, whenever in their opinion, the justice of the case requires it. But this must be taken in the sense, that the word justice, is always used in statutes, to wit, when *legal justice* requires it,—when an injustice, contrary to law, has been commit-

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ted on one of the parties. To give any other construction, would enable this court in the arbitrary and uncertain ideas, which they might attach to the word *justice*, to dispense altogether with *law*; and reduce the citizens of the land, to enjoy their rights and properties, at the discretion of this tribunal.

Another argument is pressed:—great injustice it is said, may be done by inferior courts, in refusing a continuance, and shall there be no redress for it? If arguments of inconvenience are to overturn law and precedent, the weight of them be found on our side. Let this court only think, what a temptation they hold out to perjury,—that placed here, they never can have the means of judging, like the inferior court, of the conduct or credibility of the party who makes the affidavit; and it will be easily seen on which side the balance preponderates. The case from 1 *Martin* 108, illustrates this position. A new trial was moved for there, because the court refused to continue the cause on a strong affidavit. The judge rejected the application, stating that there were suspicious circumstances attending the party who made it, such as swearing he was sick, though his appearance in court contradicted the assertion. How could all this ever have been brought up before a court of appeals,

so as to have enabled them to judge of the credit due to the affidavit?

But if this court has the power to consider the refusing to grant a continuance, as error in law; still a correct decision was given below. The affidavit was defective in two essential requisites, that are ever required on applications of this kind; viz. the exercise of due diligence—and the probability of obtaining the testimony wanted. The district court of course did right, in rejecting the application.

Martin, J. delivered the opinion of the court. The defendants pray, that this cause may be remanded to the district court, under the 18th section of the act of 1813, ch. 47, which empowers this court to remand in all cases, in which it appears to them, that justice requires it: and in order to satisfy us, that justice does require it, their counsel alleges, that injustice was done below, by refusing him a continuance, in order to enable him to place before the court a piece of evidence, which was material to their defence, and which by accidents, without their control, after having used due diligence, they were disabled from obtaining early enough for the trial.

The plaintiff meets the defendants on the

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threshold, by alleging, that the granting, or denial of a continuance, is a matter to which no right can exist, it being entirely a matter of favour and discretion.—And that the discretion of the inferior court below is, in this respect, under no kind of control.

1. The first authority, to which our attention is drawn, is a *dictum* of Lord Kenyon, that in an action on a penal statute, the court of the king's bench, will not put off a trial for the plaintiff. 2 *Tidd's Practice*, 708.

2. Next is introduced the case of *Robinson vs. Smith*, 2 *Boss. and Pull.* 454. in which the plaintiff claiming wages as a seaman, in a voyage from the West Indies, the defendant prayed a continuance, on account of the absence of a witness by whom he expected to prove, that the plaintiff was his slave. But the court denied the continuance, saying, the defence was an odious one, to which the court would not give any assistance, and that if the defendant were to offer to put it on the record, they should not give him a day's delay.

3. Reference is made to 2 *M'Nally's P. C.* 659, where it is laid down, on the authority of *Foster* 2, that the postponing of a trial is not a matter of right, and the court, in its discretion, may refuse or admit the motion.

4. The decision of the court of K. B. in the case of *Rex* vs. *D'Eon*, is also introduced, in which Lord Mansfield observed, that men take such a latitude in swearing in the common form, that when suspicion arises from the nature of the question, or from contrary affidavits, the court will examine into the ground, on which the delay is asked, and have in criminal, as well as in civil cases, refused to put off a trial, notwithstanding an affidavit in the common form.

Leaving aside the abstract proposition, that a continuance is not a matter of right, the authorities cited go but a little way, to shew that the discretion of the court, who is asked a continuance, is the arbitrary discretion, subject to no control, which the plaintiff's counsel insists upon, and not the legal and sound discretion, the exercise of which is a matter of revision and control.

1. In the first case, we are informed, the court of king's bench grants no continuance *in favor of the plaintiff*, in a penal action. Admitting this, justice does not appear to require, that the denial should absolutely be a ground of relief, in another court; while the plaintiff may (with some expense indeed) avert the consequent evil, by submitting to a nonsuit.

2. The case, cited from the court of common

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pleas, shews only, that it is the practice of that court, (and the practice is the law of the court) to deny a continuance to a party who alleges the slavery of his opponent, and the court appears to have acted upon a known and previously fixed principle, by which its conduct was susceptible of being tested, rather than to have been guided by an arbitrary discretion, which knows no rule.

3. *M'Nally* informs us, that the postponing of a trial is not a matter of right, either when the application is made on the part of the prisoner, or on the part of the crown; he adds, for in either case the court, *in its discretion*, even tho' an affidavit be made, may refuse or grant it. Here we are informed, why the party's claim is not a matter of right, viz. because notwithstanding the affidavit, the court is not absolutely bound, but may *in its discretion* refuse or grant the continuance.

4. Lastly, in the case of *Rex* vs. *D'Eon*, we are informed by Lord Mansfield, of the cases in which the court will, in its discretion, withhold its consent, after the ordinary affidavit is produced, viz. when *suspicion arises from the nature* of the question, or from contrary affidavits, and the court, having examined into the ground on which the delay is asked, thinks it

just not to allow it, notwithstanding the affidavit.

Opinions of the supreme court of the U. S. have also been introduced. C. J. Marshall, in the case of *Woods & al.* vs. *Young*, 4 *Cranch*, 238, declared the impression of that court to be, that the refusal to continue a cause, cannot be assigned for error, asking whether the party had by law, a right to continue a cause in any case? Whether this was not merely a matter of *favor and discretion*? And in the case of *Mar. Ins. co.* vs. *Hogson*, the same court said, that on the refusal to continue a cause, the party could not be relieved by a *writ of error*. 6 *Cranch*, 206.

The refusal of relief, in these two cases, was obviously grounded on a technical reason: that the party could not be relieved *by a writ of error*.

A writ of error, says Blackstone, is brought to correct an error, appearing on the record: the reasons which, induce the court to deny or grant a continuance, are often matters *dehors*, out of the record. The discretion of the inferior court is principally regulated in such a case by particular circumstances, of which the record affords no trace.

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A decision of the superior court of the late Territory of Orleans, in the case of the *Territory* vs. *Nugent*, has been referred to. There the court denied the continuance to the defendant, on an affidavit which it admitted was sufficiently strong. But the case shews the particular and cogent circumstances, which satisfied the court, that delay was the main object of the applicant. 1 *Martin*, 108.

We find nothing in the above cases to warrant the position, that the discretion of the court, in granting a continuance, is an arbitrary discretion, the ill exercise of which is not to be remedied by appeal: they only shew that there is no remedy upon *a writ of error*.

In ordinary cases, depending in the superior courts of England, a trial takes place at *Nisi prius*, it is there that a motion for a continuance is made, and finally pronounced upon. The judge there exercises his discretion, but if he err in doing so—the party may be relieved on a motion for a new trial in the court, to which the *postea* is returned. "If" said Lord Mansfield, in refusing the continuance in the case of *Rex* vs. *D'Eon*, "it should appear upon "the case proved at the trial, that the defen- "dant was prejudiced by refusing this delay, "the court would set it right by granting a new

"trial." Here then is a check provided, a remedy in case the discretion be incorrectly exercised.

In Virginia, if the party thinks himself aggrieved by the denial of a continuance, the law has provided a remedy. The manner in which the discretion of the judge, who overruled his motion, exercised his discretion, is an object of inquiry. The principle is recognised, that in granting or refusing a continuance, the court ought to exercise a *sound* discretion, and if a party be ruled into a trial, when it appears from the facts stated in the bill of exceptions, that he was entitled to a continuance, the judgment will be reversed, *even* on a writ of error.

In every case in which the law leaves any thing to the discretion of an officer or a court, a sound and legal discretion is understood, not an arbitrary one.

New trials are left to the discretion of a court, "It is" says C. J. Glynn, "in the discretion "of the court, in some cases to grant a new trial," but this must be a *judicial* and not an *arbitrary* discretion. *Sty.* 466. This declaration is the more important, that the case in which it was made, is said to be the first in which a new trial was granted, 3 *Morgan's essays*, 114.

Discretion, says Lord Cook, is discerning *per legem quid sit justum.* Discretion is a

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science and understanding of distinguishing and discerning, between falsehood and truth, and not to do according to arbitrary will, and private affection, *Rooke's case*, 5 Co. 100 a. See on this subject, what was said by Lord Mansfield, in the case of *Rex* vs. *Young & al.* 1 *Burrows*, 560-2.

In the state of Pennsylvania, the discretion of a judge of the circuit court, in granting a new trial, is subject to the revision of the supreme court on an appeal. *Byrd* vs. *Lessee of Darndall*, 2 *Binney*, 9.

In the state of New-York, the supreme court held that an adjournment of a sale, to a different place, is *a matter of discretion* with the constable, and the question must always be wether that discretion has been abused. Whereupon they inquired into the conduct of the constable in the exercise of his discretion. *Platt* vs. *Stone*, 5 *Johnson*, 347.

In the case of *Wanderville* vs. *Wilson*, 5 *Cranch*, 17, C. J. Marshall observed that permitting amendments is a *matter of discretion*, but added he did not mean to say that a court may in all cases permit or refuse amendment *without control*.

We conclude that nothing in the books cited by the plaintiff's counsel shews that the discretion

of the court in granting or refusing a continuance is any thing else than a legal, a judicial discretion, which is not examinable elsewere, altho' it is certainly shewn that, in England and the courts of the United States, there is no remedy, in such a case, by *a writ of error*.

Approaching, therefore, the case cleared from any obstable thrown in the way by decisions of English courts—or of the courts of the American states: we find it laid down as a maxim of Roman jurisprudence, which still prevails in Spain, that the judge *ad quem* will correct the errors of the judge *a quo*, even in interlocutory judgments or orders, whenever they occasion *gravamen irreparabile*—and the statute of this state (1813) authorises this court to remand the case, for *a new trial*, whenever justice appears to require it. On this part of the case, we have only to consider this abstract question: Can the improper denial of a continuance occasion, in the words of the Roman law, *irreparabile gravamen* to the party? And, in those of our statute: Will not justice sometimes require that a cause should be remanded, for a new trial, when the judge *a quo* denied a continuance?

This abstract question we declare ourselves unable to answer in the negative. We find it answered, in the affirmative, by able judges in

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England and in the United States, and we find no judge any where answering it in the negative: and we conclude that this court may, and ought to, inquire into the manner, in which the judge *a quo* exercised the discretion, committed to him, in allowing or refusing the continuance of a case, whenever the party appears thereby to suffer an irreparable injury.

In the present case, we are of opinion that the district judge exercised his discretion soundly and legally, and properly denied the continuance of the cause.

Years had elapsed since the inception of the suit, and the document, for the want of which the cause was sought to be continued, ought much earlier to have been looked for.

The motion to remand this cause must therefore be overruled.

PROVOST vs. *PROVOST & HENNEN.*

A sale of land, by a husband to his wife, to replace the value of real estate, part of her paraphernal property, by him sold, is valid.

APPEAL from the court of the fifth district.

DERBIGNY, J. delivered the opinion of the court. The appellant, Alfred Hennen, who is a party intervening in a suit between Henrietta Provost, the appellee and her husband, is the purchaser of a tract of land, seized upon the said Joseph

Provost, and sold by the sheriff: which tract is claimed, by the appellee, by virtue of a previous public act of sale to her made by her husband, for replacing in part her *paraphernalia*, which had been by him disposed of and alienated.

The appellant alleges that this deed was not made *bona fide*, but with a view to defraud creditors and third persons: the appelee avers that it is a *bona fide* contract, and denies the fraud. The case stands before us on that issue.

Our civil code (*book* 3, *tit.* 6, *chap.* 2, *art.* 45.) authorises the contract of sale, between husband and wife, in certain cases, one of which is, where the transfer is made by the husband, to the wife, for a legitimate cause: such as *replacing* her dotal or other effects alienated. The question here is whether this be such a contract.

The appellee has proved that she was possessed of *paraphernalia*, consisting in money, cattle and other effects, and two slaves, which with the exception of one slave, were disposed of by her husband, for his own use, previous to the sale on which she relies. It is unnecessary here to determine whether there can be any such thing, as *replacing* money and other moveable effects with real estate, and whether a sale like the present can ever take place in any other case, than those where real property or slaves,

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the title to which was in the wife, have been alienated, because there has been in this case that kind of alienation evidently contemplated by the law, to wit, the alienation of a slave whose title was in the wife. For the replacing of that property, the contract is assuredly legal; and as the value of that slave, at the time of his alienation, is proved to have been fully equal to the value which the property transferred to the appellee, by her husband, had at the time of such transfer, we must pronounce the transfer to be a valid contract.

It has been suggested that no delivery of the land in contest was made to the appellee; but this fact making no part of the issue, the appellee cannot suffer for having not offered to prove it.

It is adjudged and decreed, that the judgment of the district court be affirmed with costs.

Baldwin for the plaintiff, *Hennen, in propria personâ.*

SORREL vs. *ST. JULIEN.*

The party, to whom a new trial is improperly denied, may be relieved in the supreme court.

APPEAL from the Court of the fifth district.

MARTIN, J. delivered the opinion of the court. The appellant and defendant prays that the suit be remanded for a new trial, because the

judge below improperly denied him a new trial, on affidavit of new discovered evidence.

The plaintiff resists the application, 1. because he alleges, a new trial is within the discretion of the inferior court; and this cannot examine into the manner in which that discretion is exercised.

2. Because the discovery of new evidence is made to appear by the sole affidavit of the defendant.

3. Because the judge *a quo* properly exercised his discretion and no new trial ought to have been granted.

1. It is shown from a number of cases, that the supreme court of the United States holds that the denial of a new trial cannot be relieved *upon a writ of error*. *Henderson* vs. *Moore*, 5 *Cranch*, 11. *Ma. In. Co.* vs. *Bourg*, 187. *U. S.* vs. *Evans*, 280. If this was only a court of error, it might think itself bound by these authorities and deny relief. The causes of suspending judgments, after a verdict given by granting a new trial are matters, at present wholly *extrinsic* arising from something foreign to, *dehors*, the record. 3 *Blackst. Comm.* 24. A writ of error is brought to remedy an error apparent on, within the record. *Id.* A tribunal constituted to correct

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errors in law, intrinsic errors, apparent on the record, may well reject an application to inquire into an error of fact; one *dehors* the record.—But this is a court of appeal, and one of its bounden duties is to remand "the cause to an inferior court, from which the appeal is made, whenever it shall appear that justice requires the same." *Act of March* 26, 1813. *sec.* 18.

We are told that new trials being in the discretion of the court, like continuances and amendments, the superior court cannot control the inferior court in the exercise of that discretion.

The nature of the discretion of the court below, in granting and denying continuances, has been particularly examined in the case of *Broussart* vs. *Trahan's heirs*, just determined in this court, and shewn to be not an arbitrary, but a sound, legal and judicial discretion, to be guided by a fixed principle and subject to the revision and control of the superior court: that which is exercised on motions for a new trial is precisely the same.

In the case of *Brooks' sy.* vs. *Weyman*, this court said that *the* (not *a*) refusal, to grant a new trial was no cause of appeal, and we find the ground of this decision to be, that the judgment, entered in the district court, was *quasi* a judg-

ment of the superior court, from which an appeal did not lie. 3 *Martin*, 17.

In *Fortier* vs. *Declouet, id.* the court refused to revise the discretion of the district court, in declining to discharge him from his bail bond; probably the inconvenience complained of was not *irreparabile gravamen*.

So, whatever may have been said, in the case of *Labatut* vs. *Pueche, id.* 325, the refusal of a special *venire* could not work an irreparable injury: for on the appeal the judgment of this court would be the same, whether the suit was tried before a special or ordinary jury.

We conclude that this court will relieve on the improper denial of a new trial, when thereby the party sustains an irreparrable injury; and this perhaps will be confined to the sole case of new discovered or rejected evidence; when this evidence does not come up with the record. In most, if not all, other cases the injury will seldom be irreparable: as relief will generally be had, on an appeal, on the merits.

H. It is true the supreme court of the state of Vermont has holden, in the case of *Webber vs. Ives*, that it will not grant a motion for a new trial, for the recent discovery of new and material evidence, supported by the single affi-

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davit of the party; but the motion must be accompanied by the affidavit of the witness recently discovered, 1 *Tyler*, 443, and we have been referred to the cases of *Long* vs. *Weeder & al.* 1 *Johns.* 425, *Doe* vs. *Roe*, *id.* 404. *Dew* vs. *Dennison*, 5 *Johns.* 248, *Smith* vs. *Brush*, 8 *Johns.* 84. From which it appears, that several affidavits, in cases similar to the present, were introduced. From hence the inference is drawn that, that of the party is not sufficient. We, however, do not deem these authorities conclusive. The case of Vermont is not parallel to this, which is that of a *paper* said to be discovered. Would the court there have required the affidavit of the new discovered witnesses, if they had been at a great distance?

III. The new trial was asked on the alleged discovery of a paper, from which proof, of the payment of the debt to the plaintiff, was expected to be made. But the defendant had not pleaded *payment*, His only defence was (in answer to the plaintiff's petition) that he never assumed or promised to pay the sum claimed; that he owed no part of it; that the money claimed was paid by the plaintiff as a voluntary courtesy, without any expectation of its being reimbursed; that the advance stated was not made, and the debts of the defendant alleged

to have been paid by the plaintiff, were never paid by him, and are still claimed from the defendant, by his original creditors; that if the defendant made any promise the plaintiff, it was obtained by fraud or made thro' error; now, a plea of payment, had it been added, would have been inconsistent with the first part of the defence. But, as it was not made, the judge below rightly concluded that little attention was due to the allegation, on which the new trial was asked and rightfully denied it.

We are, therefore, of opinion that the motion to remand the cause ought to be overruled.

The case, being submitted to us on the merits, without any argument, we find the plaintiff's claim fully supported, by the evidence, and the defence not maintained. It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

REEVES vs. *KERSHAW.*

A constable selling land, under a justice's execution must advertise it in the same manner as the sheriff, under an execution from a parish or district court.

APPEAL from the court of the fifth district.

MATHEWS, J. delivered the opinion of the court. This is a case in which the plaintiff and appellee brought suit against the appellant, for a tract of land, described in the petition.

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It appears from the statement of facts that both parties claim it, through one Patrick Johnson: the defendant by virtue of a constable's sale, made in pusuance of an execution, issued on a judgment, rendered by a justice of the peace against Johnson, at the suit of one Biggs; the plaintiff by a deed of sale, duly executed, whereby the land is conveyed to him by Johnson. The constable's sale being anterior to the execution of the deed of Johnson to the plaintiff, the only question in the case relates to the validity or invalidity of that sale.

The legality of the judgment and of the execution which issued on it is not questioned, but a violation of law is said to have taken place in the manner of selling the land, after it was seized by the constable.

We do not find any rule laid down to regulate the conduct of constables, in sales made by them of immoveable property taken in execution. By the 23d section of the act of the legislative council, 1805, ch. 29, for dividing the territory of Orleans into counties and to establish courts of inferior jurisdiction therein, an execution, issued by a justice of the peace, could only authorise constables to seize goods and chattels, or the moveable property of the defendant, which they might legally sell after giving nine days notice

This restriction to the seizure of personal property alone, in cases within the jurisdiction of a justice of the peace, continued until the year 1810, when, by an act of the territorial legislature, bearing date of the 23d of March, the power to seize slaves and immoveable property, in default of moveable, was given. But the act is entirely silent as to the manner, in which the constable is to proceed, in selling immoveable property. The law authorising the seizure of such kind of property not having pointed out a rule for the conduct of constables, in making sale of it, we are of opinion that such officers ought to be governed, in these proceedings, by the general rules laid down for the conduct of sheriffs, who, in executing the process of higher tribunals, seize in execution the same species of property.—They are required to advertise before the first exposure to sale, if it be real property which is seized, thirty five days: if it be necessary to offer it for sale a second time, it must be advertised thirty days more: when exposed for sale a third time, an additional notice of a fortnight is required by law.

In the case of the constable's sale under consideration, it appears clearly that these legal requisites and formalities have not been fulfilled. We are therefore, of opinion that the district

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court was correct, in adjudging a sale, thus illegally and informally made, to be null and void.

It is therefore ordered, adjudged and decreed, that the judgment be affirmed with costs.

Baldwin for the plaintiff, *Hennen* for the defendant.

BROUSSARD vs. *TRAHAN'S HEIRS*, *ante* 489.

Appeal dismissed for want of a statement of facts, &c.

In this case there being neither statement of facts, special verdict or case agreed, the appeal was dismissed.

Brent and *Parrot* for the plaintiff, *Porter* and *Baldwin* for the defendants.

*** There was not any case determined, during the months of October and November.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

EASTERN DISTRICT, DECEMBER TERM 1816.

East'n District
Dec. 1816.

HUNT vs. *NORRIS & AL.*

HUNT
vs.
NORRIS & AL.

Appeal from the court of the first district.

A shipper, sueing the master and owners of a vessel for goods lost thro' their neglect, may attach their property.

The plaintiff and appellant brought this action against the master and owners of the steam boat Vesuvius, to recover the value of goods by him shipped on board of her, to be safely carried from New-Orleans to Natchez, which he alleged to have been lost and destroyed, by the negligence and improper conduct of the defendants.

On an affidavit that the defendants reside out of the state, the plaintiff prayed and obtained an attachment, which was levied on their goods, in pursuance of the acts of legislature of the years 1805 and 1807.

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On the motion of the defendants, the attachment was dissolved and the plaintiff appealed.

Livingston for the defendants. The district court was correct in dissolving the attachment. The action arose *ex delicto*. Damages only can therefore be recovered and the plaintiffs claim could only ripen into a debt, by their being assessed in an action.

The act of 1805, *c.* 26, § 12, authorises attachment, in these actions alone in which the recovery of a *debt* is sought. *Debt* is a technical word, descriptive of the claim of a determinate sum of money, due on an agreement or contract, 3 *Blackst. Comm.* 154. Here the claim is precarious, uncertain and unliquidated.

It is true that the act of 1807, *c.* 1, § 21, describes the defendant, in a suit to be commenced by attachment, by the appellation of *debtor*, but this act is confined to the practice of parish courts.

By the English law special bail would not be allowed in the present case: the plaintiff, even if he had right to sue for a claim arising *ex contractu*, having made his election, by a demand of damages for a *tort*.

Ellery, for the plaintiff. We contend, that the word *debt*, in our statutes of 1805, *c.* 26, and 1807, *c.* 1, is to be taken in its usual and popular

signification, extending to all cases *ex contractu*, where the demand can be ascertained by the oath of the plaintiff, not in the technical sense, required by the common law of England, to support the action of debt or that of *indebitatus assumpset*.

2. The present demand falls under this popular signification of the word debt, and entitles the plaintiff to the process of attachment.

1. The above interpretation of the word debt is a reasonable one: 1 because such a remedy as by attachment is necessary, and no good reason can be shown against it.

2. This mode of proceeding is less injurious than a demand of bail; and it is not to be supposed that the legislature intended to deny the one, where it allowed the other, and would protect the property of a debtor from attachment, where it subjected his person to arrest.

3. Otherwise a large class of cases, and those of frequent occurrences, would be wholly excluded from any remedy, without any good reason for the exclusion.

4. A narrower construction would render void that clause in the affidavit, required from the plaintiff, in order to hold the defendant to bail, viz. "that the plaintiff does not, as far as the

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"deponent knows or believes, possess, within "the territory, sufficient property, *if attached*, to "satisfy the judgment the petitioner expects to "obtain." 1805, *c.* 26, § 12, and 1807, *c.* 1, § 21. The above clause, an important ingredient, in the plaintiff's affidavit, and without which the defendant cannot be held to bail, inserted in both acts, distinctly and unanswerably shews that the property of the defendant must be first *attached*, before his person can be *arrested*, and if he possess that property, no order to hold him to bail can be obtained. An attachment then is evidently, by our statutes, meant to issue when the defendant *has* property, in *all* those cases, where he might, if he *has no* property, be held to bail, viz. "whenever a petition is filed for the "recovery of any *debt or damages, on note, "bond, contract, or open account, or for damages "for injury to or detention of property.*" 1805, *c.* 26, § 11, and 1807, *c.* 1, § 21. The consequences of a different construction, in cases like the present, would be always impunity to wealth and imprisonment to poverty. If the absconding or departing debtor have *property* to pay the debt, his *person* (according to our statutes) cannot be *arrested*; neither (according to the construction contended for by the defendant's counsel) can his *property* be *attached*. Therefore, under

these circumstances, if the debtor have *sufficient property* to pay his debts, he may carry it off with impunity and set his creditors at defiance: and he can only be *arrested* for his debts, where he is unable to pay them. That no evil consequence or abuse can result, from the process of attachment, is also evident, as the law requires that "the plaintiff shall, previously to his obtaining such attachment, give bond, with good freehold security, in double the sum sworn to, for the use of the absent debtor or his representatives, conditioned for the payment of all such damages, as the defendant in attachment shall have suffered, in case it shall appear that said attachment was wrongfully said out." 1807, *c.* 1, § 21, 1811, *c.* 8, § 2. The attached property may also be released, either by proving that the facts, on which the attachment was grounded, were not truly stated, or by giving to the sheriff a bond, with sufficient security, to defend the suit and abide by the judgment of the court. 1805, 27, § 12.

5. This construction seems to result from the collation and comparison of our different statutes, upon the subjects of bail and attachment, whence it appears that attachment is intended to be always allowed, where bail can be exacted.

We have four statutes, on the subject of bail

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and attachment: two in 1805, one in 1807, and one in 1811.

The first act of 1805, *c.* 26, declares in what cases *attachment* may issue, viz. "whenever a petition shall be presented for the recovery of a debt." The 12th section declares in what cases *bail* may be required, viz. "whenever a petition is filed for the recovery of any debt or damages on note, bond, contract, or open account; or for damages for injury to, or detention of, the property of the petitioner, &c."

The other act of 1805, *c.* 5, § 8, merely authorises the respective clerks, to receive the affidavits, and issue the process.

In the 21st section of the act of 1807, *ch.* 1, the 12th section of the act of 1805, *c.* 26, is copied *verbatim*, and followed by a *proviso*, "that in all cases where an attachment is prayed for, against a debtor absent from the territory, &c." as cited *ante*, *p.* 521.

The act of 1811, *c.* 8, § 2, directs, *inter alia*, the indemnity bond, in cases of attachments, to be filed with the petition.

It is to be remarked that, independently of the clause inserted, in the affidavit to hold to bail (which shews that an attachment must be resorted to, when there is sufficient property, instead of bail) by the act of 1805, (declaring in

what cases an attachment shall issue, viz. "whenever a petition shall issue for the recovery of *debt.*") the word *debt*, is used in the most indefinite sense, unaccompanied by any article, and that in the act of 1807, the words *absent debtors* are used.

In the act of 1807, c. 1, the process of bail, and that of attachment are provided for in the same section, the 21st, the latter *following* the former and being contained in the *proviso*. The word *debtor*, there introduced, evidently means a debtor, under some of the cases enumerated in the beginning of the section, viz. *debt, damages, or note, bond, contract, open account, or damages for injury done to, or detention of the property of the petitioner.*

This section is said to be applicable to the parish court only. It applies equally to the superior, as appears from the title and subject matter of the chapter—from the words *one of the judges of the said court*, in the beginning of the section; because, in the superior court alone was there a plurality of judges, and because the court last mentioned, and of course referred to, is the superior court.

It is true the indemnity bond is required to be filed in the *parish* court. This is an apparent oversight in the wording of the law, which was

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corrected by the act of 1811, *ch.* 8, § 2, which requires it, to be filed *with* the petition.

It is objected, that by the English law special bail *would not* be allowed, in the present case.

Special bail *would* be allowed; and is allowed in *all* cases in which the damages are not precarious, or to be assessed *ad libitum* by the jury. 3 *Blackst. comm.* 292: allowed in trover, 1 *Wilson*, 25 and 335, *Catlin* vs. *Catlin*, *Emmerson* vs. *Hawkins*, 2 *East*, 953, *Imlay* vs. *Ellison*, a case similar to the present, in which defendant was holden to special bail. The same practice and principles equally apply to the writ of *ne exeat regno*.

6. The statutes, under consideration, are remedial ones, and require a liberal and equitable construction.

There appears to be a perfect harmony between our law and that of England, in the construction of statutes. The words of a law are generally to be understood, in their *most known and usual* signification, without attending so much to the niceties of grammar rules as to their *general and particular* use. *Code civil*, 9, *art.* 14. Where the words are dubious, their meaning must be sought for, by examining the context, *art.* 16. Laws *in pari materia* must be construed with a reference to each o-

ther. *Id. art.* 16. The most universal and effectual way of discovering the true meaning of a law, when its expressions are dubious, is by considering the *reasons* and the *spirit* of it, or the cause, which induced the legislature to enact it. *Id.* 20. In civil matters, where there is no express law, the judge is bound to proceed and to decide according to equity. *Id. art.* 21. The judges cannot, in criminal matters, supply by construction, any thing omitted in the law, *id. art.* 22. See the common law principles, 1 *Blackst. comm.* 59, 62, *Bacon's Abr. 1st Amer. Edit. verbo Statutes*, 384, 425, 386. *Douglas*, 30 2 *Cranch*, 386, 381, 4 *Dallas*, 30.

It is the business of the judges so to construe the act, a remedial one, as to suppress the mischief and advance the remedy. 1 *Blackst. comm.* 87 *Sergeant's law of attachment*, 40. What was in our statutes of attachment, the *mischief* complained of, and the remedy to be applied?

7. The words *debt* and *debtor*, in our statutes, and in all civil law writers, are never used in a technical sense; but always in a general, enlarged signification. The debtor is liable for *damages* and interest. 1 *Pothier, Obligations*, 159, 160. The *debtor* is sometimes liable for damages and interest, altho' extrinsic. *Id.* 161.

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8. A like construction has been put upon similar acts of attachment in different states, by respectable judges. See the opinion of judge Washington, *Sergeant's law of attachment*, 53, 54.

The words *contracted and owing*, in the law of attachment of Pennsylvania, construed by the same judge to embrace all demands arising *ex contractu*, and the measure of damages such as the plaintiff may aver by affidavit. *Id.* 52. But not for demands which arise *ex delicto*, or where special bail would not be required. See also the construction of the law of attachment of Connecticut, the words of which are *absent or absconding debtors*. *Pollard & al. vs. Dwight*, 4 *Cranch*, 421.

II. The present claim is said not to arise *ex contractu*, but *ex delicto*, and by the English law must be declared upon *in tort*.

Our practice has nothing in common with the English practice, and is not to be judged by its rules. We are bound by our act to disclose the cause of action, and conclude with a prayer for relief adapted to the circumstances of the case. We know nothing of special pleading, or the different issues of the common law of England. But, supposing this to be a court of common law,

the action is well brought, not upon a tort; but the breach of a contract. A concurrent remedy exists against *bailees* and the party may declare in *assumpsit* upon the contract, or in case upon the tort.

The appellants argue that we have made our election and have declared in *tort*. We have declared in *assumpsit*. Our petition is almost literally copied, *mutatis mutandis*, from a declaration in assumpsit against the captain of a vessel. *Chitty*, 120.

The gist of our action is the breach of contract, the non-delivery, not the wilful destruction of our goods. Assumpsit lies against bailees for neglect. 1 *Chitty*, 92.

In *Dale* vs. *Hall*, an action against a shipmaster was held by Dennison, J. to be *ex contractu*, not *ex delicto*. 1 *Wilson*, 281.

Lastly, the damages are said to be precarious, there is no standard to measure them by, and they are unascertained and unliquidated.

The amount of damages is *ascertained*, by the oath of the party, and the case itself furnishes a certain measure, by which they can be *assessed* by the court, as well as safely sworn to by the plaintiff, viz. the price of the articles themselves, which is all that is claimed of the defendant. This produces equal certainty of the sum due, as

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the case in *Sergeant's law of attachment*, viz. the difference between the value of one kind of goods and another: as in the cases of *quantum meruit* or *quantum valebant*.

On the restricted construction, contended for, on the other side, what would become of the right of a party, suing on a protested bill of exchange, to demand against an absentee the amount of re-exchange, in addition to the amount of damages and interest fixed by law?

MATHEWS, J. delivered the opinion of the court. To ascertain whether the process of attachment be the just and lawful remedy, in cases like the present, we must resort to a fair and legal construction of the legislative acts, as being the principal foundation in our laws of such proceedings—In doing this, it is necessary to turn our attention more particularly, if not exclusively, to the act of 1805, which is the law from which our courts derive their authority to proceed against the property of non-residents. The statutes of 1807 and 1811 only require some additional steps to be taken by plaintiffs in attachment, without making any change in the principles of the first laws. It is now proper to remark that the statute, which is now about to be discussed, is among the earliest acts of le-

gislation in this country, soon after it was acquired by the United States, and we believe was penned by persons, deriving their legal ideas from a knowlege of the English laws. A recurrence to general rules for the construction of laws, or the definition of legal terms, as found in common law authors, even if in any case it ought to be objected to, is fairly admissible for the present. These rules and definitions ought to be the same in every system of jurisprudence founded in common sense, and the common acceptation of words. Our statute of 1805 clearly and expressly authorises proceedings *in rem*, in cases of attachment, in a suit for the recovery of a debt due by a person residing out of the state. If we refer to authors on the common law of England to ascertain the legal acceptation of the word *debt*, in its most strict and technical meaning, it is perhaps limited to the idea of a determinate sum of money, due on an express agreement. 3 *Blacks.* 154. Yet, the action of debt is not confined to contracts for money alone. As expressed by the same writer, in the following page, "its form is sometimes in the *de-*"*bet* and *detined*, and sometimes in the *detinet* "only, as in an action for goods, for a horse, &c." Also, in *Chitty on pleadings*, it is stated that an action of debt lies in the *debet* for goods, as

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on a contract to deliver a quantity of malt, &c. Thus we see that, according to the authorities, the action of debt in the *detinet* is a legal remedy, on an express agreement to deliver any specific property; and the person, who for a lawful consideration promises to deliver to another a quantity of goods, specified in the agreement, ought to be considered the *debtor* of the latter for the things promised, and then these things constitute a *debt*. Nothing can be more evident than the truth of this position, when the obligation arises on an express contract. Is it less true, or well founded, when the contract is implied? We think not. Obligations, arising from implication of law, are equally binding with those, created by an express agreement. Whether the obligation of a common carrier to indemnify a person, who has entrusted him with goods, which are lost by the negligence of the former, be one growing out of an express or implied contract may be doubted: but, admitting its origin to be from implication, the indemnity due is not less a debt. In 2 *Blackst.* 464, where the author treats of the action of debt, it is stated that in a bailment, "if the bai-"lee loses or detains a sum of money bailed to "him, for a specific purpose, he becomes *indebt-*"*ed* to the bailor, upon the same numerical sum

"upon his implied contract." Here we see a debt may be created by implication, in a contract of bailment, when the thing bailed is *money*. In express contracts, we have seen that a promise to deliver *any property* or goods, specified in the agreement, makes the promisor *debtor* to the promisee for these goods; and the things promised constitute a *debt*. The obligations arising from implied contracts are equally binding on the obligor as those arising from express contracts; therefore, the bailee of goods who loses or detains them improperly, becomes *indebted* to the bailor for those goods. If this conclusion be correct (of which we have no doubt) then the case cited, from *Sergeant's law of attachment*, is completely applicable to the one now about to be decided. The words of the act of Pennsylvania, on which the decision alluded to is founded, do not embrace a greater variety of contracts than our act of 1805. It is true that there an express contract existed, in which the defendant in the attachment, bound himself to deliver teas of the first quality to be sold for the benefit of the plaintiff, in a market stipulated between the contracting parties, and if the teas should not prove of such a quality, he bound himself to make good the difference. On this agreement, the plaintiff having ascertained

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by his own oath the amount of the deficiency, the court supported the attachment. But we have already shewn, that no distinction ought to be made between an express and an implied contract, and do therefore conclude, that it may be properly and safely laid down as a general rule, that all obligations arising from contracts, either express or implied, either for the payment of money or the delivery of goods, create a debt on the part of the obligor, for which an attachment may issue, whenever the amount may be fairly ascertained by the oath of the obligor.

In this view of the subject, we deem it unnecessary to examine the reasoning of counsel drawn from the similarity betwixt bail as authorised by law and attachments.

If we turn to writers on the civil law, it is found that he is said to be a debtor, who owes reparation or damages for the non-performance of his contract. 1 *Pothier on Obligations, n.* 159.

The judge of the district court erred, we think, in considering the obligation of the defendants and appellees to indemnify the plaintiff and appellant for his loss, (if any exists) as arising *ex delicto* and not *ex contractu*; it is clearly one arising out of a contract of bailment, and which, in conformity with a proper acceptation of the word debt, authorises the plaintiff to

have his attachment against the property of the defendants.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and that the cause be sent back to be tried on the merits, and that the parties be replaced in the situation in which they were before the judgment of the district court, dissolving the plaintiff's attachment.

MAYOR &c. vs. DAVIS.

Tho' the appellant have no good ground to relief, if he appears to have been under an error, damages will not accompany the affirmance of the judgment.

APPEAL from the court of the parish and city of New Orleans.

MATHEWS, J. delivered the opinion of the court. The plaintiffs and appellants brought this suit for the rent of a house &c. described in the petition, according to a written contract, by which the defendant agreed to pay them rent at the rate of $2520, *per annum*. Judgment having been given for them, he appealed.

It appears by the statement of facts, that the appellant applied to the city council for a reduction of the sum, which he had bound himself to pay in his original contract, which was allowed him, for a fixed and determinate period, and that he had the benefit of this allowance.

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The judgment of the parish court does not exceed the sum due by the appellant in his original contract, and is therefore correct. The only question before us, is, whether damages ought not to be allowed to the appellees as on an appeal taken for the sake of delay only. But, as the defendant seems to have been under some mistake, in relation to an allowance for some repairs, we are of opinion that the justice of the case requires only the affirmance of the judgment.

It is therefore ordered, adjudged and decreed that the judgment of the parish court be affirmed with costs.

Moreau for the plaintiffs, *Esnault* for the defendant.

If goods be in the hand of an auctioneer, on which he has a lien, at the time when his office expires, and he afterwards sell them, under a new commission, his original sureties are not liable, if he fail to account for the proceeds of the sale.

CLAIBORNE vs. *DEBON & AL.*

APPEAL from the court of the first district.

MARTIN, J. delivered the opinion of the court. This is an action brought, in the Governor's name, against the sureties of an auctioneer.

The petition states that the party aggrieved has lately obtained a judgment against the auctioneer, for the amount of sundry goods de-

livered him to sell at auction, of which no account was ever rendered and the record of the suit is referred to. It is further stated that the defendants are the auctioneer's sureties, that he has failed and ceded his goods &c. so that the defendants are liable.

They have filed separate answers.

The first defendant denies the breach of any of the conditions of the auctioneer's bond—avers that, during the whole time in which they were his sureties, and at the conclusion of it, he was largely in advance to the real plaintiffs. He denies his liability for any errors in the balance, if any existed—alleges that the accounts between these plaintiffs and the auctioneer were regularly produced and settled during that time, and that it is only since his failure, that the present claim has been exhibited, and without the knowledge or privity of this defendant.

The other denies all the facts in the petition, and avers that the claim is now prescribed and lost.

At the trial, the execution of the bond by the defendants was admitted.

Referees were appointed, who reported that, at the conclusion of the period during which the defendants were the sureties of the auctioneer, he was in advance for the real plain-

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tiffs of the sum of $ 1797 48, and had in his hands goods of theirs, part of which has been accounted for; say to the value of 3094 dollars 82 cts. the rest unaccounted for being of the value of 2453 dollars; that deducting from the aggregate of these two sums, that of which he was in advance, there remained due to the plaintiffs 3750 dollars 4 cts. at the time of his failure.

On this report, the judge *a quo* gave judgment for the defendants, and the plaintiffs appealed.

By consent, the report is to be received as a statement of facts, as well as the record of the suit, in which judgment was obtained by these plaintiffs against the auctioneer.

This record shews that they sued him for the amount of sundry goods, sold by him, at different times for their account. Among the papers filed in this suit (which are also referred to) is an unsigned account, by which it appears that accounts of sales were rendered by him for a small parcel of goods, amounting together to about 121 dollars, as sold, since the expiration of the time during which the defendants were his sureties. The balance is stated as deficient in the account of sales rendered.

On these facts, the plaintiffs contend that the court below, being bound to proceed *super allegata*

et probata, erred in giving judgment for the defendants—that the suretiship was admitted—the receipt of goods from the plaintiffs, during the existence of the suretiship, and their remaining on hands unaccounted for at the expiration of it, fully establish the claim against the defendants, and it must prevail unless their principal has relieved them, by the return of the goods, or a disposal of them in such a manner, as may exonerate them.

Such a return or disposal is said not to be alleged.

The first part of the answer of the first defendant, which denies the breach of any condition in the bond, is not supported, it is contended, by any fact established, while the contrary appears.

2. The second part, alleging the advances made by the auctioneer, is admitted to diminish the claim, and both he and the defendants have had the benefit of it.

3. We are told that the denial of a liability for any error in the accounts needs not be attended to; nothing being claimed on that score.

4. It is asserted that the allegation, that the accounts between the parties were duly produc-

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ed and settled, during the existence of the suretiship, is not proven.

5. The plaintiffs see nothing of any avail in the averment of the defendants that they were not parties in, and had no notice of, the plaintiffs' suit against the auctioneer; as the amount of the claim is now adjusted with the defendants, and the suit against the auctioneer is brought to view, for the sole purpose of establishing the inability of the claimants to obtain any thing from their principal debtor.

Nothing, it is further contended, in the answer of the second defendant, can affect the claimants. The plea of the general issue being necessarily found against him and the allegation, that the right is prescribed and lost, senseless; the claim being at the inception of the present suit but three or four years old.

The defendants urge that the goods, which were in the auctioneer's hands, when their suretiship expired, were left with him as a lien for the advances he had made, and to be sold by him as an auctioneer, under a new commission which he obtained without the defendants becoming his bondsmen—that consequently his failing to account for sales made of these goods; or withholding the proceeds of such sales cannot affect the defendants, but must be visited

on his new sureties (if any were given) or on him alone, if he gave none.

The effect of such a sale, it is replied by the plaintiffs, cannot be considered; for the sale was not alleged, nothing appears from the pleadings, and they deny that there is any evidence of it. That there is evidence of it, in the petition of the plaintiffs against their principal debtor, in which this claim is made for goods *sold* at different times; and as the statement of facts shews that the goods were *remaining on hand*, unsold at the conclusion of the period of the defendants' suretiship, the sale must necessarily have taken place *afterwards*, when the defendants might be answerable for the withholding of the goods, or any failure to deliver them back, but not for any waste, embezzlement or withholding of monies received on the sale of them; that tho' a sale, contrary to, or without the plaintiffs' order might be a tortious disposal of the goods, which might affect the defendants; they cannot now be liable, as the claimants, by suing for the proceeds of the sale, have impliedly admitted, that it was lawfully done for their account, and thus sanctioned it.

It appears to this court, that the goods of the real plaintiffs, left in the hands of the auctioneer, for the double purpose of securing the advan-

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ces he had made, and of being sold by him, after the expiration of the time for which the defendants were his sureties, cannot be considered at the defendants' risk.

It is, therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Livingston for the plaintiff, *Turner* for the defendants.

CROCKER vs. *WATKINS.*

If the property advertised for sale, on an execution, be not sold, it is to be advertised anew, as if it had not been advertised before.

APPEAL from the court of the second district.

DERBIGNY, J. delivered the opinion of the court. This is a suit for damages against the sheriff, who is said to have exposed property for sale, without having advertised the time and place of sale, in the manner prescribed by law, by reason whereof and other illegal practices, it is alleged, the property was sold for less than its value.

The material facts, as they appear from the statement, annexed to the record, are that the defendant and appellee, sheriff of the parish of Ascension, having seized several slaves, the property of the plaintiff and appellant, in ex-

ecution of a judgment obtained against him, advertised them for sale for the space of time required by law, viz. thirty five days, next preceding the day of sale; but, that on the day appointed, the slaves were not exposed to sale, on account of the defendant's absence, and his deputy postponed the sale for eight days, at the expiration of which the slaves were exposed and sold. It further appears that the slaves had been bought by the plaintiff and appellant, in 1812, at a credit of one and two years, for the sum of 4615 dollars, or thereabouts, some of them having been purchased jointly with others, not included in the seizure here mentioned) that they were appraised to the sum of 3600 dollars, and were sold for that of 2647 dollars.

The main question, arising in the case, is whether it be discretionary with the sheriff to postpone a sale for any time he chuses to fix, when, owing to some impediment, the sale could not take place on the day which had been appointed according to law.

The exercise of discretion, in the execution of legal acts, must either be permitted by some express provision of the law, or be authorised by the example of constant practice, acquiesced in for a length of time. But, according to the

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statute of the state, the property seized must be exposed for sale, *on the day fixed by law.* Nothing is said, as to what shall take place, if some unforeseen accident prevents the sheriff from fulfilling that duty: and as to the rules of practice, which existed here, before the promulgation of the statute (admitting that they be resorted to in cases of this nature) they are so widely different from our present mode of practice, that they afford but little or no information, as to the manner of acting in a case like this. It cannot be said, therefore, that a long established practice, authorised the defendant to exercise the discretion which he assumed.

What then shall be done, when some unforeseen obstacle prevents the sale from taking place on the day appointed? We think that, in such a case, the only regular way of proceeding is to begin anew, and advertise the sale again for the same space of time. Such was the practice in the Spanish tribunals, when the proclamations, *pregones,* had not been regularly made. 1 *Febrero, zondo,* 11, *n.* 8. A practice nearly similar prevails in Virginia, when the property seized in execution remains unsold in the hands of the sheriff. 3 *Tucker's Blackst. ch.* 26, *sec.* 2, *in notis.*

The doctrine of discretion in the execution of

legal solemnities, cannot be supported on any ground, even that of necessity. The consequences to which it would open a door, are too obvious to require any comment.

The remedy, to which the plaintiff has thought it to resort in this instance, is an action of damages against the sheriff. To his demand it is objected, that, the postponement complained of was notified to the attorney in fact of the plaintiff, on the very day that it took place, and that on the day to which the sale was adjourned, the said attorney was present at, and did not object to the sale. 2. That the plaintiff has sustained no injury.

1. We do not think that, from the silence of the plaintiff and attorney in fact, or the plaintiff herself, it ought to be implied that she gave her consent to the postponement of the sale for eight days. The sheriff acted, not by virtue of any consent on her part, but from his own authority. Her silence may have been the effect of a persuasion that no objection could avail her, or that she had no right to interfere. At any rate, it would be giving to that silence a most extensive interpretation to consider it, as a positive acquiescence, and approbation of the sheriff's conduct.

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CAVELIER
vs.
WATKINS.

II. But, has she proved that she sustained any injury, and if any, to what amount?

On this question, the material evidence seems to be confined to this—That the slaves sold by the sheriff for 2645 dollars in 1816, had cost in 1812, 4,645 dollars, at one and two years; that they were appraised, previous to the judicial sale, at 3650 dollars; that negroes were worth more in 1816 than in 1812; that two persons who had come to the sale, on the day first appointed, went home and were not informed of the time of the second sale, and that there were no more than eight or ten persons present then. One witness, who bought four of the slaves, swears that all but one were sold for their real value: another, who bid on each of them, swears that they were all sold for their real value. They all brought more than two thirds of the estimation.

It must be confessed that it is not easy from such evidence to assess the damages, which the plaintiff and appellant has sustained. If there was any scale by which that was to be ascertained, it was by the appraisement; but it is contradicted by the depositions of two witnesses, except so far as it relates to the value of the mulatto wench *Manon*, which one of them ad-

mits to be one hundred, or one hundred and fifty dollars more than the price at which she was sold. To that sum, therefore, the damages which are to be allowed to the plaintiff must be restricted

It is ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed, and that the appellant do recover from the appellee the sum of one hundred and fifty dollars with costs.

Morel for the plaintiff, *Duncan* for the defendant.

BORE'S EX'R. vs. *QUIERRY'S EX'R.*

Appeal from the court of the first district.

The record of a former suit, between the parties, is evidence, altho' it was dismissed.

The plaintiff and appellant is the testamentary executor of Mary Bore, a free woman of colour, who is alleged to have been for a number of years in an universal partnership with one Quierry, the defendant and appellee's testator, and the object of his suit is the recovery of one half of the property left by Quierry.

The answer states that the plaintiff's testatrix, in her life time, far from pretending to

East'n. District. Dec. 1818.

CARONDELET vs. WATKINS.

II. But, has she proved that she sustained any injury, and if any, to what amount?

On this question, the material evidence seems to be confined to this—That the slaves sold by the sheriff for 2645 dollars in 1816, had cost in 1812, 4,645 dollars, at one and two years that they were appraised, previous to the judicial sale, at 3650 dollars; that negroes were worth more in 1816 than in 1812; that two persons who had come to the sale, on the day first appointed, went home and were not informed of the time of the second sale, and that thereupon no more than eight or ten persons present there. One witness, who bought four of the slaves, swears that all but one were sold for their real value: another, who bid on each of them, swears that they were all sold for their real value. They all brought more than two thirds of the estimation.

It must be confessed that it is not easy from such evidence to assess the damages, which the plaintiff and appellant has sustained. If there was any scale by which that was to be ascertained, it was by the appraisement; but it is contradicted by the depositions of two witnesses, except so far as it relates to the value of the mulatto wench *Manon*, which one of them al-

mits to be one hundred, or one hundred and fifty dollars more than the price at which she was sold. To that sum, therefore, the damages which are to be allowed to the plaintiff must be restricted

It is ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed, and that the appellant do recover from the appellee the sum of one hundred and fifty dollars with costs.

Morel for the plaintiff, *Duncan* for the defendant.

BORE'S EX'R. vs. QUIERRY'S EX'R.

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Appeal from the court of the first district.

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The answer states that the plaintiff's testatrix, in her life time, far from pretending to

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have been in partnership with Quierry, acknowleged herself his servant; that she has been rewarded by a legacy of $ 1500; and that, finally, as she lived in public concubinage with the defendant's testator, her suit cannot be maintained.

During the trial, in the district court, the defendant offered in evidence, the record of two suits, instituted by the plaintiff's testatrix against the present defendant and appellee, for the purpose of shewing that she was the servant of his testator. The plaintiff objected to the introduction of these records in evidence, and being overruled took his bill of exceptions.

In support of his claim, the plaintiff introduced several witnesses, from the tenor of whose depositions, it appeared that about thirty years ago the plaintiff's testatrix went to live with the defendant's testator; she possessed, at that time, 100 dollars in cash and ten or twelve head of cattle, and both exerted their industry in common: he disposed of the proceeds of the property and was heard, at different times, to say that she and him were partners and one half of the property belonged to her.

But the witnesses state that she was his concubine: that, when she came to live with him,

he was settled on a tract of land which he owned, and he held property distinct from hers—that he gave her a receipt for the money which she brought, which he renewed ten or fifteen years afterwards and was seen so late as two years before his death; that she also held other property, in her own right, viz. a negro woman named Therese, whom he had bought and conveyed to her.

The records introduced as evidence by the defendant, and objected to by the plaintiff, were those of two suits instituted by the testatrix of the former against the latter to recover her wages, as a servant during all the time which she lived with his testator, and those of two female slaves of hers. The first suit was dismissed as premature, and the second was withdrawn, since his death by his executor, the present plaintiff, "in consequence of an agreement between the parties, and whereby it was "understood, that, upon the discontinuance of "said suit, the defendant should pay to the "plaintiff a legacy of 1500 dollars, left to his "testatrix by his testator, which was accordingly paid."

The defendant produced a witness, who declared that he was a neighbour and acquain-

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Quiquet's ex.

tance of Quiercy, during twenty years, and knew nothing of the alleged partnership.

There was judgment for the defendant.

Carleton for the plaintiff. It is a well established principle in law, that whenever a cause is dropped for want of prosecution, or goes on any other point than its merits, the judgment rendered thereon, or the allegations of the parties in the pleadings, cannot be read in evidence, or converted to their prejudice in a subsequent suit. A party often suffers a nonsuit, or discontinues his cause, when he discovers the grounds he had taken were untenable. A client speaks and acts only through his attorney, who may misconceive the nature and form of his action. A client may himself state his case erroneously, or new matter may come to light after the suit is begun. Shall he nevertheless persevere in his error? May he not rather discontinue his cause, and commence another, wherein the record of the first cannot be read in evidence? Such is known to be the practice in courts of justice in every country, and until now, it is believed no attempt was ever made to introduce in evidence the record in a cause which was never decided upon its merits. 4 *Bac. Abr.* 107. 3 *id.* 679. 1 *Chit. pleas and pl.* 195. *Har. ch. prac.* 254. *Peake's ev.* [illegible]

These authorities which apply to the cases of [illegible] nonsuit and dismissal, receive greater [illegible] in discontinuances, where the party *voluntarily* abandons his cause. In a nonsuit, the law [illegible] plies no such cause of action as the party alleged; in a discontinuance the party ackn[illegible] the law, and confesses his error himself. The same doctrine is also found in the Spanish laws. There a party may retract a confession which he or his attorney may have erroneously made, even in the progress of the same cause, provided he shew his error, before final judgment. *P.* 4. 3, 13, 5 *and* 6, and in *Part.* 3, 2, 5, it is expressly said, that if a plaintiff withdraw his suit from court, after the defendant has answered, notwithstanding alleged by such defendant can be raised against him in a subsequent suit, brought by the plaintiff for the same cause of action. Had the defendant therefore confessed the debt in the first suit, he might deny it in the second: this rule, if it be a just one, will surely afford the same protection to the plaintiff.

The testatrix herself was unknown to her attornies. Her case was represented to them by her friend. They took such grounds in their petition as they thought would enable them to recover. She was probably never called the servant of Querry, but by her attornies, and the proof in

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the present case in which she is stiled "mistress" and "partner," shews how her attornies either misconceived her cause of action or were uninformed of its real nature.

If notwithstanding this view of the subject the court should still think the defendant might avail himself of the declaration of the plaintiff, in a former suit which was never tried, the plaintiff may undoubtedly avail himself of the declaration of the defendant. The court will not afford to one party a weapon of attack which it denies to the other in defence. If the testatrix called herself the servant of Quierry, the defendant denied it; which puts the matter at large. Nay, the defendant farther declares that the testatrix lived in *community* of revenues with his testator, thus laying the foundation of the present action. If the court believes the defendant, they have only to give judgment for the plaintiff.

It is said the second suit was discontinued in order to receive the legacy of 1500 dolls. It is impossible to construe this into an abandonment of the claim set up by the plaintiff in the present suit. He knew the legacy was secure to him, and that he could enforce the payment of it unconditionally. The suit was discontinued solely with a view to institute one in the present form. The very object of the discontinuance

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was to enforce, not to abandon the present claim, and without an express relinquishment of a right to so considerable real estate, the court can never imply one.

The contract of partnership and every material circumstance relating thereto, having taken place long before the adoption of the civil code in 1808, the Spanish and civil laws only can apply to this case. These laws recognize but two sorts of partnership, universal and particular. *Inst.* 3, 26, § 1. *preamble—Part.* 5, 10, 3—*Cur. phil. com. ter. c.* 3, *nos.* 5. 6.

In the universal partnership all goods and effects, both present and future, become immediately the joint property of the contracting parties. *ff.* 17, 2, 1, § 1—*Cur. phil. com. ter. c.* 3. *nos.* 6, 7, and the authorities there cited.

If there be no express agreement about the profits, they are to be equally divided. *Inst.* 3. 26. § 1—*ff.* 17, 2, 7, §. 2—*Cur. phil. com. ter. c.* 3. *no.* 9—*Part.* 5, 10, 4, 7.

And this whether the acquisition be made in the joint names of the parties, or one of them only—*Cur. phil. com. ter. c.* 3. *no.* 7—*Poth. trait. de soc. nos.* 32, 33, 35, 46.

And though an acquisition be made in the name of one of the parties, it is immediately delivered to the other by construction of law.

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ff. 17, 2, 2, *quia licet specialiter traditio non intervenerit, tacite tamen creditur intervenire.* Also, *Part.* 5, 28, 4.

Again under the Spanish and Roman law it was not necessary that the contract of partnership should be in writing. *Societatem contrahere, et verbis, et per nuncium posse nos, nemo dubitat, ff.* 17, 2, 4, 4. Under the Romans the social contract or partnership, needed no other solemnity, but the consent of the parties, without any writing at all. *Watson on part.* 4. Bynkershoek beyrac in his notes on Puffendorf, observes that "a partnership is contracted sometimes tacitly." The same doctrine is laid down in the partidas. *E fazesse la compañia con consentimiento, i con ortogamiento de los que quieren ser compañeros. Part.* 5, 10, 1. So in the *Cur. phil. com. ter. c.* 8. *no.* 1. *La compañia se contrae expresamente por palabras, o tacitamente y calladamente sin ellas, por hacer acto que la induzga, o por usar de ella, como si se huviera hecha, respecto de contraerse por el consentimiento de los que hacen.*

The testimony offered by the plaintiff is not weakened by one opposing fact. The only witness examined on the part of the defendant declares negatively, that he did not know of any partnership. It is therefore conceived that

existence of the partnership is proved beyond dispute. It would be impossible to persuade the mind of the truth of any fact, if it doubted after such testimony. The witness are aged, respectable and personally known to the court. They could have had no interest in deceiving, as it is pretended they had.

Seghers, for the defendant. The district court did not err in admitting as evidence, the records of the two suits instituted by the plaintiff's testatrix. These two suits disclosed two facts, which cannot exist with that alleged in the petition, in the present case. The testatrix claimed charges for her labour and for that of her slaves; therefore, it is clear that in her judgment she had not placed her industry in a partnership with the defendant's testator; she also held her property separate from him, there was therefore no universal partnership, as is alleged in the petition.

The confession or acknowledgment of facts made by the parties, in their counsel and their pleadings, are evidence and must be admitted as *such in any action* against *them*. 2 *Pothier, Obl. n.* 797.

The evidence offered by the plaintiff does not support his claim. No part of it shews that the

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alleged universal partnership existed. It shews on the contrary that each party held property in his own right, and to his own use, independently of the other. If no universal partnership existed, the plaintiff cannot recover on a special one, because none such is alleged, and if any such was, we would yet seek in vain for a single tittle of evidence on the record, to support it.

Further, the evidence, offered by the plaintiff himself, establishes a fact which alone suffices to repel his claim, viz. the concubinage of the testatrix with the defendant's testator. Their union was an immoral one, and could not give rise to any action. *Partida* 5, 11, 28. *Code Civil*, 264. *art.* 83. And if the advantage which is claimed, viz. a participation in the defendant's testator's profit, was proven to have been actually promised, the court would see, in the engagement taken by the man, nothing else but an intention to cover a donation, on an universal title, to the woman, which the law reproves. *Code Civil*, 210 & 212, *art.* 10 & 17.

Derbigny, J. delivered the opinion of the court. It has been contended generally that the record of a suit, in which the plaintiff has been non-suited, cannot be produced against him, on

ther for the purpose of estopping him, or as evidence of facts by him acknowledged.

We do not indeed believe that the doctrine of estoppel, as known to our laws, extends to the length which the defendant contends for. In order that a demand may operate as a bar against another, it must appear, that, by the first, all rights to the second have been waved. But, altho' it must be confessed, that it is not easy to reconcile a demand of wages as a servant, with a claim as a partner, the one does not of necessity exclude the other. Actions, contrary to one another, altho' they cannot be united in a libel, may be separately instituted *quando sunt talia jura, quæ non tolluntur electione*, says *Lopez, n. 1. Part. 3, 10, 7.*

But the plaintiff has not only contended that those records could not be introduced, in support of the defendant's plea in bar, he has also attempted to shew, that they could not be produced as evidence of facts acknowledged by his testatrix. To establish this point he has quoted from *Part. 3, 22, 9.* a passage which goes to say that after a defendant has obtained the dismissal of a suit, owing to the absence or neglect of the plaintiff, it shall not be permitted to the plaintiff thereafter to avail himself, in a new action, of any thing written in the first,

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because the defendant has been liberated by that by the judgment of dismissal. But, this provision, denying to the plaintiff the right of producing in such a case the pleadings of the first suit, is certainly not applicable to the defendant.

We do not presume that the plaintiff further intended to deny generally, that the acknowledgment of parties, by their attornies in the pleadings are evidence. "The confessions or "acknowledgments," says *Pothier*, "which the "parties make in several stages of a suit, by "their instruments of writing or pleas, may also "pass for a sort of judicial confession, when "the attorney has authority from his client to "make them, and he is presumed to have such "an authority as long as he is not disavowed." 2 *Pothier's Obl. n.* In *Gilbert's law of evidence, ch.* 3. *sect.* 3, it is said "the bill in "chancery is evidence against the complainant, "for the allegations of every man's bill shall "be supposed to be true, nor shall it be pre-"ferred by the counsel or solicitor, without the "privity of the party, and therefore it is evidence "as to the confession or admission of the truth "of any fact by the party himself." In this particular instance, the soundness of that doctrine is manifest: for here is the disclosure of

an all-important fact, the proof of which was perhaps in the power of the plaintiff alone, to wit: her possessing two slaves in her own right, during all the time of her residence with Quierry.

Upon the whole, we think that the records offered in evidence by the defendant, were properly admitted, so far as his object was to establish facts disclosed by the plaintiff.

We have, in support of the partnership, acknowledgments of Quierry, made, it is not said at what time, and in opposition to them his own acts, and the acknowledgment of Martha Bore. Independently of her own avowal, that she was only his servant, we have it in evidence from her own mouth, and that of one of her witnesses, that he possessed land in his own right, and she, two slaves in hers. An *universal* partnership between them is then out of question; and if there was a *particular* one, nothing shews in what it did exist.

We are therefore of opinion, that the plaintiff's claim is not supported by the evidence: this will preclude the necessity of inquiring here, how far these can exist in the state of any such thing as a partnership between a man and his concubine, particularly between a white man and a free woman of color, living together in

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concubinage, and how far such a contract may come within the provisions of the *Part.* 5, 11, 28, and the 33d *art.* of our *Code* 264, which declares void all contracts, the cause of which is contrary to good morals and public order.

It becomes also unnecessary to decide whether the plaintiff could bring this, or any other action, against the estate of Quierry, after having consented to withdraw the suit for wages, for the purpose of receiving the legacy left by his testatrix: altho' it may be proper to observe, we were inclined to view this agreement as a compromise intended to put an end to his claim.

It is ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

GENERAL RULE.

December, 3, 1816.

It is ordered that candidates for admission to the bar, who have taken a degree in one of the incorporated seminaries in the United States, or their territories, may be examined, on shewing that they have studied two years under the direction of one of the attorneys duly admitted in this State.